UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

STEVEN B. HEPPERLE, Petitioner, vs. JOHN AULT, Warden, Respondent.	No. C01-2043-MWB **REPORT AND RECOMMENDATION ON THE MERITS**

I. INTRODUCTION

This matter is before the court on a petition for writ of *habeas corpus* pursuant to 28 U.S.C. § 2254. The petitioner Steven B. Hepperle ("Hepperle") filed the petition to challenge his March 28, 1986, conviction on a charge of first-degree murder in the District Court in and for Black Hawk County, Iowa. A summary of the facts and procedural history of Hepperle's case appears in this court's Report and Recommendation on the motion to dismiss filed by the respondent John Ault ("Ault"). (Doc. No. 31, pp. 2-10) Further procedural history appears in Chief Judge Mark W. Bennett's order adopting the Report and Recommendation, and denying Ault's motion to dismiss. (Doc. No. 34)

In his petition, Hepperle asserts two claims for relief. First, he alleges his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), were violated in connection with a custodial interrogation. (*See* Doc. No. 3, p. 4, § III(A)) Second, he alleges his trial counsel was ineffective for failing to investigate and offer evidence that another man, Dale Viers, was the "real murderer." (*Id.*, § III(B))

Specifically, Hepperle claims his trial counsel "failed to adequately investigate Dale Viers to see whether Dave Viers was the real murder[er]"; "failed to present Dale Viers as the real murder[er] during the trial"; and "failed to call an investigator to testify that Dale Viers had possibly confessed to the murder." (*Id.*)

The parties have briefed the issues thoroughly, and the court turns to consideration of these two issues.

II. STANDARD OF REVIEW

The court's review of Hepperle's petition is governed by the standards set forth by the United States Supreme Court in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The *Williams* Court explained:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 404-05, 120 S. Ct. at 1519 (quoting 28 U.S.C. § 2254(d)(1)).

Under the first category, a state-court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.*, 529 U.S. at 405, 120 S. Ct. at 1519. The Court explained:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts.

Id., 529 U.S. at 412-13, 120 S. Ct. at 1523. Further, "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of [the Court's] decisions as of the time of the relevant state-court decision." *Id.*, 529 U.S. at 412, 120 S. Ct. at 1523.

The second category, involving an "unreasonable application" of Supreme Court clearly-established precedent, can arise in one of two ways. As the Court explained:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id., 529 U.S. at 407, 120 S. Ct. at 1520 (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)). Thus, where a state court "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case," that decision "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established federal law.'" *Id*, 529 U.S. at 407-08, 120 S. Ct. at 1520. Notably,

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id., 529 U.S. at 411, 1250 S. Ct. at 1522.

If the state court decision was not contrary to clearly established Federal law, as determined by the Supreme Court of the United States, and if it did not involve an unreasonable application of that law, then the federal court must determine whether the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

III. ANALYSIS

A. Hepperle's Statements to Law Enforcement

Hepperle argues his rights were violated when he was questioned by law enforcement officers about Diane Voss's murder before he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Ault argues Hepperle was not "in custody" at the time of his interrogation, and therefore, no *Miranda* warnings were required. (Doc. No. 49, pp. 41-46) Ault argues further that even if Hepperle's statements to police should have been excluded from evidence at the trial, the error was harmless because other evidence that inevitably would have been discovered proved Hepperle's guilt beyond a reasonable doubt. (*Id.*, pp. 48-49)

In *Miranda*, the United States Supreme Court held that before law enforcement officers may interrogate a suspect in their custody, they must advise the suspect of his right not to incriminate himself and his right to an attorney. *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612. The Court explained a custodial interrogation occurs when "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, 384 U.S. at 444, 86 S. Ct. at 1612; *accord Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714 (1977) (*per curiam*). An interrogation encompasses direct questioning as well as the functional equivalent of interrogation, tested objectively; *i.e.*, "any words or actions on the part of the police (other than those normally

attended to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980); *accord United States v. Hatten*, 68 F.3d 257, 261 (8th Cir. 1995). Whether a suspect is in custody is a mixed question of law and fact which the courts resolve using a "totality of the circumstances" approach. *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990) (citing *United States v. Carter*, 884 F.2d 368, 370 (8th Cir. 1989)).

A brief review of the relevant facts in the present case will assist the analysis of whether Hepperle was "in custody" at the time of his statements to officers at the police station. Diane Voss's body was found at about 8:00 a.m. on July 17, 1985. She was lying face down on the floor next to her bed in her Waterloo, Iowa, residence. She had been bound, sexually abused, and strangled. There was no sign of forced entry at the house, and the Vosses' three sons had slept through the night in the residence without being awakened. Several items were missing from the Vosses' bedroom drawers and closets, including the victim's undergarments and much of her clothing, as well as a coffee can containing about $30.00 in change.

The Waterloo Police Department dusted the entire house for fingerprints, and interviewed neighbors and friends of the victim and her family. They considered four possible suspects: Hepperle, a former neighbor who was on parole from a prior sexual abuse conviction; Vern Voss, the victim's husband; Mike Winters, a friend of Vern's; and Dale Viers, a neighbor and known voyeur. On July 18, 1985, officers went to Hepperle's home in Evansdale, Iowa, to question his girlfriend, Dawn Pitts. An officer took Pitts to the Waterloo police station for the interview. During her interview, Pitts made an unsolicited statement claiming Hepperle was with her at the time of the murder.

After the interview, the officers returned Pitts to the Evansdale residence, and then asked Hepperle to come to the Waterloo police station for questioning. Hepperle agreed, and rode with an officer to the station, where the interview took place in a closed room in which Hepperle and an officer were the only persons present. Hepperle told the officer that on the night of the murder, he had been at two different bars with friends, and then he had returned to the Evansdale residence to spend the night. The officer questioned Hepperle for about two hours, and then drove him back to the Evansdale residence.

Police had difficulty confirming Hepperle's alibi, and they interviewed Hepperle several additional times at his place of employment. At some point during his interviews, Hepperle told police he had been at the Voss residence on July 16th, and used the telephone. On July 26, 1985, police learned Hepperle's fingerprints had been identified as among those found at the scene. One of his fingerprints was inside a dresser drawer where the victim had kept undergarments which were missing. Another of his fingerprints was found on a plexiglass window pane at the rear of the house, at the location of an attempted burglary that was reported by the victim a few days prior to the murder. Hepperle was arrested and charged with the murder. At trial, Hepperle argued the fingerprints were made on earlier occasions.

Hepperle filed a pretrial motion to suppress his statement at the Waterloo police station, arguing he was in custody at the time of his interrogation. The Black Hawk County District Court denied the motion. Hepperle raised the issue on direct appeal, and the Iowa Court of Appeals affirmed the trial court's ruling, holding as follows:

> Having reviewed the record in this case, we find that [Hepperle] was not in custody when his interrogation occurred. The evidence does not support a conclusion that [he] was "deprived of his freedom in any significant way." [Hepperle] voluntarily went to the police station after a police officer asked if [he] would come to the station to discuss the incident.

> [Hepperle] rode in the police car with the officer so as to facilitate transportation, not because he was being taken into police custody. The interview was conducted in a friendly, cordial manner and [Hepperle] was not threatened or coerced. The interview occurred during normal working hours. Nothing was ever said to [Hepperle] to indicate that he was not free to leave. The investigation was still in its early stages and had not focused on [Hepperle]. Rather, the police had several possible suspects at the time of [Hepperle's] interview. The United States Supreme Court has stated that *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275, 1279-80 (1983) (citation omitted). Because the police did not so restrict [Hepperle's] freedom as to render him in custody, *Miranda* warnings were not required.

State v. Hepperle, Iowa Sup. Ct. No. 86-605, slip op. at 2-3 (Iowa Ct. App., Nov. 30, 1987) (Doc. No. 50, Tab B) (hereafter "Opinion on Direct Appeal") (also citing *Mathiason, supra*).

Hepperle argues the appellate court unreasonably applied *Miranda* and *Mathiason* in finding he was not in custody during his interrogation. He advances the following arguments:

(1) The fact that "the investigation was in the early stages of investigation" was irrelevant to the inquiry and was not a proper factor to consider. Doc. No. 48, p. 30 (citing *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 3520, 77 L. Ed. 2d 1275 (1983)).

(2) The fact that "police had several other suspects at the time of the interview" was irrelevant to the determination of whether Hepperle was free to leave. *Id.*, pp. 30-31 (citing *Mathiason*, 429 U.S. at 495, 97 S. Ct. at 714;

Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976); *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984)).

(3) The court ignored the fact that Hepperle was never told that he was free to leave or the interview was voluntary. He asserts, "The absence of police advisement that the suspect is not under formal arrest has been identified as an important indicium of the existence of a custodial setting." *Id.*, p. 31 (citing *Minnick v. Mississippi*, 498 U.S. 146, 155, 111 S. Ct. 486, 492, 112 L. Ed. 2d 489 (1990); *Mathiason*, 429 U.S. at 495, 97 S. Ct. at 714). Hepperle argues the appellate court "'turned this rule on its head by crediting the officer that 'nothing was ever said to [Hepperle] that he was not free to leave.'" *Id.*, p. 32 (quoting Opinion on Direct Appeal at 3; citing *Minnick*).

(4) The court ignored the fact that the officer initiated the interview with Hepperle. *Id.*, p. 32 (citing *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612; *Beckwith*, 425 U.S. at 341, 96 S. Ct. at 1612).

(5) The court "failed to consider the police dominated atmosphere of the interrogation," which Hepperle claims was present "from start to finish." *Id.*, pp. 32, 33 (citing *Miranda*, *Berkemer*, *Mathiason*, *Beheler*, and *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969)).

(6) The court failed to consider the length of the interrogation – two hours – which Hepperle claims is "longer than two other interviews the Supreme Court has found to be noncustodial." *Id.*, p. 34 (citing *Beheler*, *Mathiason*).

(7) The fact that the interview occurred during working hours was irrelevant and given undue weight by the appellate court. *Id.*, p. 35.

Viewing the evidence objectively, the court finds no indication whatsoever that Hepperle believed his freedom had been curtailed to the same extent an arrest would have curtailed it. He knew Pitts had been interviewed at the police station. When an officer brought her back to the Evansdale residence, the officer asked Hepperle if he would answer some questions, and Hepperle voluntarily agreed to ride with the officer to the police station for an interview. The Iowa appellate court found Hepperle rode with the officer only to facilitate transportation, not because he was being taken into custody. In its pretrial ruling on Hepperle's motion to suppress, the trial court noted Hepperle rode in the front seat of the police car, he was not handcuffed or restrained in any way, and he engaged in small talk with the officer. The trial court further found, "There were no guards placed outside of the room and . . . [t]he tone of the interview was that of a friendly and normal conversation with [Hepperle] appearing to be relaxed." (Doc. No. 50, Tab A, p. 144) There is nothing to indicate these factual findings were incorrect.

Simply stated, the court finds Hepperle reasonably could not have believed he was under arrest at the time of the interview. The court further finds he was not "in custody" during the interrogation, and his rights were not violated by the officer's failure to give the *Miranda* warnings. The Iowa courts' decisions on this issue were in accord with applicable Supreme Court precedent. The Iowa courts did not apply the law unreasonably to the facts of the case, nor were their factual findings unreasonable in light of the evidence. This claim should be denied.[1]

B. Ineffective Assistance of Counsel Claim

1. Applicable law

[1]Because the court finds no error was committed, the court does not reach the harmless error analysis.

The standard for proving ineffective assistance of counsel was established by the Supreme Court in *Strickland v. Washington*:

> *First,* the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Furthermore, even if the defendant shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Representation is an art, and an act or

omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id. See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000)

(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

2. Application of the law to Hepperle's claim

Hepperle argues his trial counsel was ineffective in failing to argue Dale Viers was the "real murderer." Hepperle states he "does not argue that the state court decision was contrary to *Strickland* but rather [was] an unreasonable application of *Strickland*." (Doc. No. 48, p. 11) He acknowledges he must do more than show the Iowa courts applied *Strickland* incorrectly, in this court's independent judgment; rather, he must show the Iowa courts "applied *Strickland* to the facts of his case in an objectively unreasonable manner." (*Id.*, p. 12, citing *Bell v. Cone*, 535 U.S. 685, 688-89, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002)). He argues the Iowa Court of Appeals, in its opinion affirming the denial of postconviction relief, applied both the cause and prejudice prongs of the *Strickland* test unreasonably.

Hepperle first complains the Iowa Court of Appeals only conducted "a bare bones analysis" of the performance prong of the *Strickland* analysis. (*Id.*, pp. 14-15) He argues at length that the facts indicate his attorney's performance fell below an objective standard of reasonableness, pointing to his attorney's failure to call certain witnesses, to cross-examine the State's witnesses effectively, and to follow up on evidence indicating Viers might have murdered Diane Voss. (*See id.*, pp. 15-23) He finds fault with the Iowa court's brief discussion of the "cause" prong, which consisted of the following:

> Based on [counsel's] investigatory conclusions, he decided to focus on Vern Voss, not Dale Viers, as the person who killed Diane Voss. At the postconviction trial, [counsel] testified he made his tactical decision based on his belief it was the most likely to result in Hepperle's acquittal. He also testified Hepperle participated in formulating this trial strategy. We are

> unable to say counsel's tactical decisions were unreasonable or Hepperle was resultingly deprived of effective assistance of trial counsel.

(Doc. No. 50, Tab E, p. 7; Doc. No. 48, p. 15) Hepperle argues this is not reasoning, but a conclusion. (Doc. No. 48, p. 15) He claims the Iowa court "unreasonably accepted [trial counsel's] explanation for why he chose to focus on Verne Voss . . . instead of Dale Viers. . . ," despite "all of the evidence pointing to Dale Viers." (*Id.*, p. 23)

Hepperle next complains the Iowa Court of Appeals's conclusion that he failed to show prejudice from his trial counsel's performance was reached without any supporting analysis whatsoever. The Iowa Court of Appeals held, "Even if we were to find counsel breached any essential duty, the record clearly establishes Hepperle's failure to prove he was prejudiced by counsel's actions." (Doc. No. 50, Tab E, p. 8; Doc. No. 48, p. 23)

The court disagrees that the Iowa Court of Appeals failed to support its conclusion with a recitation of applicable facts. In the introductory portion of its opinion, under the heading "Background Facts and Procedure," the Iowa court noted the following:

> The postconviction court summarized the State's case against Hepperle as follows:
>
> a. He was a former neighbor of the victim, was personally acquainted with her and had been in her house before;
>
> b. His fingerprint was found inside of one of the drawers on the dresser in the victim's bedroom; her underwear was usually kept in that drawer, but was missing; the fingerprint could not be dated, but was in a position where it could have been easily rubbed off;
>
> c. His fingerprint was also found on a plexiglass window pane in the back of the victim's house. The location of the print was consistent with the removal of the pane; the

> victim had reported an attempted burglary through that door a few days before her death;
> d. His alibi testimony was inconsistent and not confirmed by the persons he claimed to be with;
> e. He wrote a letter to an acquaintance asking her to help him fabricate an alibi, but she refused and informed the police;
> f. He confessed to killing Voss to an inmate in jail, providing details;
> g. He had been previously convicted of third-degree sexual abuse in Marshall County, Iowa, and the facts of that crime were very similar;
> h. Dale Viers, a window peeper outside the victim's window[,] overheard statements made by a man whose voice was very similar to Hepperle's[.]

The State's theory of the crime as summarize by the postconviction court was:

> Hepperle tried unsuccessfully to break into the Voss home on July 13 when the victim's husband was not home. He returned on the evening of July 16 and used some ruse to gain entry to the home, bound the victim and strangled her. Afterwards he tried to manufacture an alibi, but when the police discredited his alibi, he tried to find someone else to help fabricate one.

We share the assessment of the State's theory and supporting evidence and adopt it as our own.

(Doc. No. 50, Tab E, pp. 2-3, emphasis added) With this factual foundation, the Iowa court then proceeded to discuss Hepperle's ineffective assistance of counsel claim.

The Iowa court was not required to make a detailed analysis of both the cause and prejudice prongs of *Strickland*. A finding that Hepperle failed to meet either of those prongs was sufficient to deny his claim for relief. *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. As noted above, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*). Based on the overwhelming evidence of Hepperle's guilt, the Iowa Court of Appeals concluded Hepperle had failed to prove the result of the trial would have been different if his trial counsel had offered evidence to implicate Dale Viers in the murder.

The court agrees with this conclusion. Without ruling on the performance prong of the analysis, the court finds Hepperle has failed to show he was prejudiced by his attorney's alleged errors. Besides the "overwhelming evidence of [Hepperle's] guilt" noted by the PCR court (*see* Doc. No. 50, Tab C, p. 7), there was also a lack of evidence to tie Viers to the murder. No physical evidence was found in or around the Voss household to indicate Viers had been there, and none of the victim's property was found in Viers's residence. [2]

The court finds the Iowa court reasonably applied the law to the facts of the case in finding Hepperle had not shown he was prejudiced by his trial attorney's performance. Because Hepperle cannot show prejudice, this claim should be denied.

IV. CERTIFICATE OF APPEALABILITY

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[2] *See, e.g.*, Trial Tr. 899-904, 917, 964 (excerpted in Appendix - Vol. 4 in Hepperle's appeal from the denial of postconviction relief, Iowa Sup. Ct. No. 97-628) ("PCR App.") (none of the fingerprints found at the scene were identified as Viers's prints); 928-30 (same) (none of the hairs found at the scene were consistent with Viers's hair); 1069 (PCR App. - Vol. V) (none of the victim's property was found in Viers's residence).

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Hepperle has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

V. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[3] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), within ten days of the service of a copy of this Report and Recommendation, that Hepperle's petition be denied, and judgment be entered in favor of Ault and against Hepperle.

IT IS SO ORDERED.

DATED this 13th day of February, 2004.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[3]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).